

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT.

THOMAS W. PACK, STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Appellants,

vs.

E. THOMPSON,

Appellee.

Brief on Behalf of Appellee.

Upon Appeal from the United States District
Court for the Southern District of California,
Southern Division.

R. P. HENSHALL,
Merchants National Bank Bldg., S. F.,
H. L. CLAYBERG,
JNO. B. CLAYBERG,
WELLES WHITMORE,
Pacific Building, San Francisco,
Solicitors for Appellee.

Filed this.....day of January, A. D., 1915

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk

THE TEN BOSCH COMPANY, SAN FRANCISCO

FEB 1 - 1915

F. D. Monckton.

NOS. 2535, 2536, 2537

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THOMAS W. PACK,
STELLA SCHULER and
JOSEPH K. HUTCHINSON,

Appellants,

vs.

E. THOMPSON,

Appellee.

BRIEF ON BEHALF OF APPELLEE.

These three cases are before this Court on separate appeals from orders made in each case, granting injunctions *pendente lite* upon the hearing of orders to show cause.

In case No. 2535 there were involved 175 placer

claims, and the Notice of Forfeiture claimed \$5,600.00 due on account of annual representation claimed to have been performed on such claims for the years 1911 and 1912.

In case No. 2536, 12 placer claims are involved and the Notice of Forfeiture claims \$1,200.00 spent by appellant Pack in representing such claims for the year 1911.

In case No. 2537, 44 placer claims are involved and in the Notice of Forfeiture appellants claim that appellant Pack expended \$4,400.00 on such claims for the representation thereof for the year 1912.

The allegations of the respective complaints and the Notices of Forfeiture, which are attached thereto, disclose that in No. 2535 forfeiture is sought for the same amounts of money claimed to have been expended in 1911 and 1912 as is claimed by such notices relating to the representation of 12 claims in 1911 and 44 claims in 1912.

Counsel for appellants, in their statement of the case utilize the bill filed in No. 2537 and carefully abstain from any extended references to No. 2535 wherein the same amount of money is demanded as representation expended on the 175 claims. Counsel also fail to state that the 12 claims represented in No. 2536 and the 44 claims in No. 2537 are a part and parcel of the 175 claims in No. 2535. In the statement is also omitted an allegation which is found in the complaint in No. 2535, (record, pages 33 and 34), in which it is alleged that the complainant and his co-locators, while engaged in the performance of the

annual representation upon said 175 claims for the year 1912 were forcibly prevented from completing the same upon the whole of said claims by the Foreign Mines Development Company, the American Trona Company and the California Trona Company, or their agents and employees, and that complainants and their employees were forcibly ejected and driven from the claims by the said companies, or their agents, and that they were threatened with great physical violence and injury if they, or either of them returned to work on the placer claims.

Following the example set by counsel for appellants of filing only one brief in all of these cases, we shall also present but one brief in behalf of the appellee.

It is well for the Court to remember that upon the filing of the complaints in each of these three cases, Judge Bledsoe granted an order to show cause why the injunction prayed for should not be granted, and restrained defendants in such suits, until the hearing of the order to show cause. The order to show cause came on for hearing before the Court on December 8th, 1914, and appellants filed no affidavits or papers of any kind in their behalf, but submitted the matter to the Court below upon the complaint and affidavit attached thereto. As said by Judge Bledsoe in his opinion rendered upon the hearing of the order to show cause, after reciting and summarizing the essential allegations of the complaint, which were made positively:

“If these facts thus alleged be true, and at this time the Court must assume them to be true, because no affidavit or answer in opposition to or in explanation of them, has been presented by the defendants, then it would appear that the defendants have no right to claim or exact a forfeiture, as against the plaintiff, for his failure to contribute his share of the assessment work, and that the proceedings on the part of defendants, leading up to the service of the notice of forfeiture, and in the recording thereof, are substantially a nullity, in so far as they seem to have effected a divestiture of plaintiff’s undivided interest in and to the mining property in question. On such a state of facts I apprehend the Court, after an accounting or other appropriate investigation, would make a decree determinative of the rights of the parties and the protection thereof. This decree, under the case as made by the facts to be taken as true would in its substantial aspects be in favor of the plaintiff.” (Rec. p. 46.)

Judge Bledsoe then determines that from the facts alleged, a cloud would be cast upon the title of complainants in the property described in the complaints, by the recording of the copy of the Notice of Forfeiture and the affidavit of its personal service, and directs that an injunction *pendente lite* issue in behalf of the complainants.

We have not time to consider these three cases separately, although No. 2535 may be considered a stronger case upon the Notice of Forfeiture than either of the others, but we are willing to submit the matter to the Court for its decision upon all the cases, after calling the attention of the Court to a few fundamental principles applicable thereto.

The purpose of the bills of complaint was to procure an accounting of the moneys claimed to have been expended by Thomas W. Pack, one of the appellants, in the alleged representation of certain placer mining ground, described in the bills of complaint, and to enjoin the defendants named therein, from taking any steps toward a forfeiture of complainants rights and interests in these placer claims, until it could be determined how much, if any, money had been actually paid by Pack in such assumed annual representation of the claims. The complainants by their bills offer to pay defendants in said suits whatever amount the Court might decide had been expended by Pack for the purpose of annual representation.

The theory of the bills of complaint is, that the filing of a copy of the notices of forfeiture, with an affidavit of service thereof, would create a cloud upon the respective complainants interest in the property described in the various complaints; that the Court should prevent the casting of such cloud on complainants' title, by its writ of injunction, until it was determined how much, if anything, appellant Pack had expended upon the property and an opportunity given to the complainants to pay such amount and prevent a forfeiture of their interest in the property.

It would require extrinsic proof to remove the effect of a recordation of a copy of the Notice of Forfeiture and the Affidavit of Service, because under Section 2324 R. S. U. S., if one co-owner of a mining claim fails to contribute his proportionate share of

the expense of the representation of such claim, and receives personal notice from the co-locator who expended the money, unless he pays such money, within ninety days from the service of the notice, his rights are forfeited. By a recordation of a Notice of Forfeiture and the affidavit of service under Section 1426~~8~~ Cal. C. C., a presumption arises that the co-owner upon whom the Notice of Forfeiture was served has failed to contribute his share. In order to remove the effect of filing of copies of these notices and affidavit of service, we would be compelled to show extrinsically such facts as would render the same void and of no effect. We do not hesitate, therefore, to say that the filing of the copies of the Notice of Forfeiture and the Affidavit of Service, would cast and create a cloud upon the title of complainants in the property mentioned in the complaints.

Pixley v. Huggins, 15 Cal. 128.

Whitney v. Port Huron, 88 Mich. 268.

Waterbury Savings Bank v. Lawler, 46 Conn. 243.

McConnaughy v. Pennoyer, 43 Fed. 339.

Lubbock v. McMann, 82 Cal. 226.

It is a well known doctrine that equity has jurisdiction to *prevent* the casting of a cloud upon title.

Palmer v. Boling, 8 Cal. 388.

Tibbetts v. Fore, 70 Cal. 243-47.

Mechanics Bank v. City of Kansas, 73 Mo. 555-559.

Hare v. Carnall, 39 Ark. 196-202.

Burnett v. Cincinnati, 3 Ohio, 73-88.

McConnaughy v. Pennoyer, 43 Fed. 339.

Pixley v. Huggins, 15 Cal. 128.

~~pledged~~ The material allegations of the complaint, properly ~~pledged~~, must be admitted to be true upon this hearing. It is true that many of the allegations of the complaint are upon information and belief, yet sufficient positive allegations are contained therein to warrant the Court below in granting the injunction prayed for.

Judge Bledsoe in his opinion upon hearing of the order to show cause under which the injunctions *pendente lite* were granted, summarized the positive allegations of the complaint as follows:

“That the plaintiff in the year 1910, in conjunction with the defendants, Pack and certain other individuals mentioned, located and recorded 175 certain placer mining claims, situate in the County of San Bernardino, State of California; that plaintiff is now, and ever since the day of said location, has been the owner and holder of a one-eighth undivided interest in and to the said placer mining claims, and each of them; that during the month of September, in the year nineteen hundred and fourteen, the defendant herein, caused to be served upon plaintiff a certain Notice of Forfeiture set out in the bill of complaint and by which it was sought, pursuant to the Sections of the Revised Statutes and Civil Code above referred to, to forfeit the title of plaintiff in and to each and all of the one hundred and seventy-five described placer mining claims heretofore referred to; that said Notice contained the appropriate statements that unless plaintiff, within ninety days after the service of the same upon him, paid to the defendants, or to the defendant. Joseph K. Hutchinson, for said defendants, the sum of Seven Hundred Dollars (\$700) claimed to be one-eighth of the total

amount of money claimed to have been expended by the said defendant Pack, upon said claims, in the years nineteen hundred and eleven (1911) and nineteen hundred and twelve (1912); that the interest of plaintiff would become forfeited to the said Joseph K. Hutchinson; plaintiff then alleges that the said Pack did not expend, or cause to be expended, of his own money, during the years nineteen hundred and eleven (1911) and nineteen hundred and twelve (1912), or at any other time, the sum of Fifty-Six Hundred (\$5600.00) Dollars, of which the said Seven Hundred Dollars (\$700) was the one-eighth part upon or for the benefit of said placer mining claims, or at all; that at least twenty-eight hundred and thirty-six (\$2836.00) Dollars was contributed by plaintiff, and his co-locators, to the defendant Pack for the purpose of doing the assessment work upon the claims mentioned for the years nineteen hundred and eleven (1911) and nineteen hundred and twelve (1912); plaintiff further alleges that whatever title or interest the said Hutchinson obtained or holds in and to the said claims, was obtained and is held for the sole use and benefit of the Foreign Mines and Development Company, the American Trona Company and the California Trona Company.”

All of these allegations being deemed to be true, there can be no question but that they presented a case to the Court, which authorized the issuance of an injunction *pendente lite*, to hold the situation between the parties in *status quo* until the final determination of the suit.

For any further argument of these appeals, appellee refers to his brief this day filed in this Court in Nos. 2539 and 2540, Thomas W. Pack, et al, appel-

lants v. E. Thompson, appellee, and hereby makes said brief in so far as applicable to the questions involved herein, a part of this brief.

We submit that the orders appealed from should be affirmed.

R. P. Henshall
H. L. Clayberg
Jno. B. Clayberg
Wm. H. Whitmore

Solicitors for Appellee.

